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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

WILL RAY HENRY,

PETITIONER

VS.

DELHI-TAYLOR OIL CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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Petitioner, Will Ray Henry, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Texas.

OPINIONS BELOW

The judgment of the 28th District Court of Nueces County, Texas, in Cause Number 73714-A, was entered on June 26, 1964. The opinion of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas setting at Corpus Christi, Texas, in Cause No. 125, delivered and filed on May 12, 1966. (Append x A) The opinion of the Supreme Court of Texas in Cause No. A-11,582 was delivered on May 31, 1967

(Appendix A). Petitioner's Motion for Rehearing was denied on July 14, 1967 (Appendix A). The opinion of the Supreme Court is reported in 416 SW2nd 885.

JURISDICTION

The Supreme Court of Texas entered its opinion on May 31, 1967 (Appendix A) and Petitioner's Motion for Rehearing was denied on July 14, 1967 (Appendix A). The jurisdiction of this Court is invoked under 28 USC 1257 (3).

QUESTION PRESENTED

Whether the rendered judgment and the action of the Texas Supreme Court in failing and refusing to apply its own Rule of Civil Proceedure, have denied Petitioner his "hearing" guaranteed by the due process provisions of the Fourteenth Amendment to the United States Constitution.

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix B: Rule 279, Texas Rules of Civil Proceedure; Rule 503, Texas Rules of Civil Proceedure. Rule 1, Texas Rules of Civil Proceedure.

STATEMENT

Will Ray Henry, Petitioner herein, was an employee of Roy Vickers Lease Service, an independent contractor. Vickers was hired by Delhi-Taylor Oil Corporation to do extensive work

on Delhi's pipelines running through its refinery in Corpus Christi. While prosecuting the work of his employer, Henry suffered severe injuries. Henry was welding two pieces of twenty-four inch pipe that were located in a ditch. A dragline earth moving machine was being operated some twenty to thirty feet from the ditch in which Henry was working. All of such work was under the direction and control of Delhi-Taylor. The dragline bucket, being operated by another Vicker's employee, punctured one of Delhi-Taylor's pipelines, which contained toluene, a highly flammable fluid. The toluene, escaping from the punctured pipeline, spurted up, over and into the ditch in which Henry was welding. The toluene ignited from Henry's welding torch and Henry was burned over eighty-five percent of his body with first, second and third degree burns.

Henry instituted a lawsuit against Delhi-Taylor alleging that Delhi-Taylor owed him a duty to provide him a safe place to work or that Delhi-Taylor owed him a duty to warn him of dangerous conditions that were known by Delhi to exist on their premises.

Henry prevailed in the Trial Court and in the Court of Civil Appeals on the basis that Delhi-Taylor had breached its duty to provide Henry with a safe place in which to work or to warn him of the dangerous condition. This was the well settled law in the State of Texas. Notice, no issue was submitted, or requested on the question of whether Vickers, the Petitioner's

employer was warned of the dangerous condition. No objection was made to such issue not being submitted and no findings were requested at any time on this question.

Then, on application for Writ of Error, the Supreme Court changed the law and declared that a warning to the employer independent contractor discharges the duty to warn the employee of the independent contractor. Then rather than remand the case for new Trial Under the newly declared rule of law, even though the Trial Court and both parties presented the case based upon the principle, firmly established by the Supreme Court in their prior decision in the case of Galveston Houston Electric Ry. Company, Reinle, 113 Texas 456; 258 SW2nd 803, (1924), the Supreme Court rendered the Plaintiff take nothing. This rendition was squarely in the face of the fact that no evidence was submitted by the Plaintiff on the question of warning to the employer, Vickers, and no issues or findings requested on such question.

REASONS FOR GRANTING THE WRIT

The Texas Supreme Court has deprived Petitioner of his right to a "hearing" guaranteed under the Fourteenth Amendment to the United States Constitution in two ways:

(1). By failing and refusing to apply that Court's own Rule 279, Texas Rules of Civil Proceedure and,

(2). By rendering a judgment that Petitioner take nothing rather than remanding the case for a new Trial.

The Texas Supreme Court's own Rule 279, Texas Rules of Civil Proceedure provides:

> Rule 279 provides in its applicable portion that, " . . . where a ground of recovery consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery . . . are omitted without request or objection.
>
> and no written findings are made such omitted issue or issues shall be deemed as found by the Court in such a manner as to support the judgment."

In order to reach the ultimate error that is sought to be corrected you must begin with the original cause of action, for the reason that the law which controlled the theory of your petitioner's cause of action was well settled law in the State of Texas, Reinle Case, Id.

The preparation and presentation of this cause of action were predicated upon this well established theory. The Special Issues upon which this case was submitted to the Jury in the Trial Court were formulated and based upon this well settled law. This same approach and theory was continued up to and including the Petitioner appelee's position before the State Supreme Court. Not until the Supreme Court rendered its opinion not only overruling the Reinle Case, id., but reversing and rendering the decisions of the Court of Civil Appeals and the Trial Court in the instant case. In order to accomplish this the Supreme Court, by necessity, was required to change the law that controlled the theory upon which Petitioner based his whole cause of action. Now please note the following statement carefully.

Your Petitioner does not complain to this Court that the Texas Supreme Court, in its wisdom changed the law. The error complained of is two fold:

(1). The Supreme Court ignored its own Rule 279 and did not deem as found in support of the judgment the unsubmitted issue of warning. The law preceding the Supreme Court's decision did not require that a special issue be submitted or a finding made on the question of whether a warning had been given by the owner-occupier to the employer of the injured employee of the existing dangerous conditions. Under the Reinle Case, id. decision, the Supreme Court had specifically declared that warning or knowledge given or possessed by the independent contractor employer is not sufficient to satisfy the duty owed by the owner-occupier of the premises. No issue was requested on this question, and the lack of request for this issue was never objected to and no findings were requested by the Defendants on this question. Rule 279, Texas Rules of Civil Proceedure. The record is absolutely silent with regard to the issue of warning. Therefore, under the directive provisions of Rule 279 the unsubmitted issue of warning should have been "deemed as found by the Court in such a manner as to support the judgment . . . ", and herein the Texas Supreme Court failed and refused to follow their own rules and thereby denied this petitioner a fair and meaningful "hearing". Certainly a "fair and meaningful hearing", guaranteed by the United States Constitution is not a hearing in which the rules by which a controversy

is to be resolved can be changed at the will or whim of the Court. This is exactly what has occuried here. The Texas Supreme Court changed the rules after the contest was finished and declared the winner the looser under the new rule. This surely cannot avoid violating the due process of law provisions of the Fourteenth Amendments to the United States Constitution.

(2). The second error which petitioner would urge is that he has as a practical matter and as a matter of fact been denied by the action of the Texas Supreme Court the opportunity to be heard at all. As was made clear earlier, your Petitioner fully recognizes the State Supreme Court's authority and responsibility to change the law. However, to render, rather than remand for new trial under the newly declared law is to deny this Petitioner the opportunity to be heard. Not an ounce of evidence was developed on the question of warning to the employer by the Plaintiff, Petitioner. Why? The law was clear that warning to the employer was not sufficient to satisfy the duty owed to the employee by the owner-occupier. This had been declared by the State Supreme Court itself some years before. Reinle, id. Therefore, your Petitioner has been denied due process of law by being denied the opportunity for a hearing at which he could present his evidence to satisfy this new requirement of law.

This Court has repeatedly declared as it stated in Armstrong vs. Manzo, 85 S. Ct. 1187, that, it is

> "A fundamental requirement of due process is the opportunity to be heard; it is an opportunity which must be granted at a meaningful time in a meaningful manner."

No one can seriously maintain that your Petitioner has had an opportunity for "a meaningful hearing", in time or manner since the law that controlled his total cause of action was changed after his case was tried and granted. Furthermore, in the case U. S. vs. Dillman, 146 F2nd 572, although certiorari was denied in that case, the Court stated that,

> "basic elements of full and fair hearing include the right of each party to be appraised of the evidence plus the right to examine, explain or rebut all such evidence."

In this case, Petitioner has never had the opportunity, much less a "full and fair hearing" to "examine, explain or rebut" any evidence in regard to a sufficient warning to the employer as satisfying the duty to warn the employee.

Petitioner recognizes that this Court has also declared that the Fourteenth Amendment ". . . has not the effect of imposing any form or mode of proceedure. But in that same statement in S.A.S. vs. State of Mo. 334 F2nd 506, the Court went on to say,

> " . . . so long as the essential rights of notice, hearing or opportunity to be heard . . . are not interferred with."

The Texas Supreme Court promulgated the Rules of Civil Proceedure itself. Rule 279 is one of that Court's own rules and it

specifically provides that an unsubmitted issue under the circumstances of this case shall be deemed as found in support of the judgment. If we are to assume that the objections of the rules " . . . are to obtain a just, fair, equitable and impartial adjudication of the established principles of substantive law ", as is the stated objective in Rule 1, Texas Rules of Civil Proceedure, then it must follow that to arbitrarily refuse to apply these Rules as the Court has done in this case is to interfer with due process guaranteed by the Fourteenth Amendment to the United States Constitution.

The question presented is basic and of utmost importance to our whole system of jurisprudence. Can a man be deprived of his property simply by the Courts refusing to apply an applicable Rule and/or by changing the law and refusing him the opportunity to be heard on the changed law? The security of knowing these rights are protected and secured to every individual in this country underlies the very foundation of our entire system of law.

CONCLUSION

To declare again the rights and guaranteed secured in the Fourteenth Amendment to the United States Constitution, Petitioner respectfully prays that this writ of certiorari be granted.

Respectfully submitted,

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